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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of  Implementation of Section 703(e) of the Telecommunications Act of 1996  Amendment of the Commission's Rules and Policies Governing Pole Attachments	CS Docket No. 97-151
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**REPLY COMMENTS OF ICG COMMUNICATIONS, INC.**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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### **Summary of Position**

As discussed in ICG's opening Comments, the Commission should clarify that the obligations of nondiscrimination and good faith negotiation require utilities to agree to appropriate most favored nation provisions in pole attachment agreements. The Commission must reject, however, proposals by various pole owners to impose additional procedural requirements upon parties seeking to invoke the Commission's jurisdiction to resolve pole attachment disputes. Proposals to require telecommunications carriers to negotiate for a minimum period of time or to provide prior notice of their intention to file a pole attachment complaint would serve only to delay relief when utilities refuse to negotiate in good faith. The imposition of an "exhaustion" requirement, forcing parties seeking pole attachment agreements to raise every possible issue in negotiations before filing a complaint would mandate an exercise in futility in many cases because some issues simply are not relevant until others are resolved. Proposals for a time limit on bringing pole attachment complaints or a minimum amount in controversy would increase utilities' opportunities to discriminate and to collect excessive rates. The best way for the Commission to facilitate pole attachment negotiations is to adopt a clear and predictable rate methodology.

The opening Comments demonstrate near-unanimous agreement that utilities cannot restrict or charge additional fees for dark fiber leasing by attaching parties, with the single exception that a CATV operator leasing dark fiber must pay the rate for telecommunications attachments under section 224(e), rather than the CATV-only rate under section 224(d). The leasing of dark fiber in cables used to provide CATV or

telecommunications services does not remove pole attachments from the scope of section 224 as contended by one electric utility.

Contrary to the position taken by some CATV operators, CATV operators must pay pole attachment fees at the telecommunications attachment rate determined under section 224(e) for all attachments used to provide telecommunications services. Permitting them to continue to pay rates under section 224(d) for attachments used for an integrated CATV and telecommunications network would be discriminatory, favoring one telecommunications technology over others.

Section 224(e)(2) requires the apportionment of two-thirds of the cost of unusable space among all revenue-producing users of a pole or conduit. Proposals to exclude incumbent LECs from the count of attaching entities would permit the overrecovery of pole costs by electric utilities. Similarly, electric utilities must be counted as attaching entities in order to prevent overrecovery by incumbent LECs. The Commission should reject out of hand the proposal by a few utilities to exclude CATV operators from the count of attaching entities because those utilities seek to impose *more* than two-thirds of the cost of unusable space upon *each* attaching telecommunications carrier.

The opening Comments demonstrate that it is vital for the Commission to determine a presumptive average number of attaching entities per pole. Most pole owners contend that they should be given broad discretion to determine such an average despite their incentives to understate the count in order to maximize pole attachment rates. Although there was limited support for a national survey such as that proposed by ICG, only such a survey can produce unbiased and timely urban, suburban, rural and regional averages

based upon a sufficient number of poles to be meaningful. Pending the development of such a survey, the Commission should adopt the presumptions proposed by Comcast, which are derived from publicly available data, or at a minimum, the more conservative presumptions proposed by GTE and AT&T.

The opening Comments confirm that, as discussed by ICG, under widely accepted engineering standards telecommunications attachments generally require less than one foot of usable space on a pole. The Commission should spur utilities to permit such efficient construction practices by basing its section 224(e) rate formula on an allocation of six inches of usable space.

As ICG noted in its opening Comments, usable conduit space should be allocated on the basis of one quarter of a duct, rather than the Commission's half duct proposal. Arguments to the contrary fail to recognize the nearly universal use of innerduct in both new and existing conduits or are simple attempts by electric utilities to double-charge telecommunications carriers for the use of innerduct.

Regardless of whether utilities may be required to acquire additional right-of-way rights for attaching parties, the Commission needs to emphasize that they have an obligation to consent upon reasonable and nondiscriminatory terms to the placement of telecommunications carriers' facilities in their rights-of-way. The Commission similarly should clarify that both owners of a jointly owned pole are obligated to provide nondiscriminatory access. Finally, the proposals by some electric utilities to abandon the settled construction of section 224 in favor of rates based upon replacement costs are beyond the scope of this proceeding and economically flawed and must be rejected.

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**REPLY COMMENTS OF ICG COMMUNICATIONS, INC.**

ICG Communications, Inc. ("ICG") hereby submits its reply comments concerning certain of the comments submitted by other parties in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. telecommunications.

**I. The Commission Must Not Impose Additional Procedural Requirements When Utilities and Telecommunications Carriers Fail to Resolve a Dispute Over Charges for Pole Attachments.**

Congress has directed the Commission to adopt in this rulemaking "regulations ... to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges." Consistent with that mandate, the Commission has proposed to require parties to attempt to negotiate pole attachment rates in good faith before filing a complaint and to describe their efforts at negotiation in any complaint. As discussed in ICG's opening Comments, the Commission should also provide guidance concerning what constitutes good faith negotiation on the part of a utility. In particular, the Commission should

emphasize that it is inconsistent with the obligations of nondiscriminatory access and nondiscriminatory rates under sections 224(f)(1) and (e)(1) for a utility to refuse to agree to an appropriate most favored nations provision. The Commission must reject, however, the efforts by some utilities to interpose various procedural obstacles to the filing of a pole attachment complaint that are not contemplated by the statute.

In what they assert to be an effort to make negotiations more meaningful, some utilities urge the Commission to require attaching parties to negotiate for a minimum of six months before filing a complaint.<sup>1</sup> Although it may sometimes require six months or more to negotiate all of the issues in a pole attachment agreement,<sup>2</sup> the Commission should not require telecommunications carriers to negotiate for any minimum period of time. At times it is manifestly apparent that protracted negotiations would not be productive. A difference of six months can make or break a construction project, given that there may be three or more carriers (one of whom may be the utility or an affiliate) racing to meet a customer's deadline. If, for example, a utility categorically refuses to permit access to poles, ducts, conduits or rights-of-way used by other telecommunications carriers or to discuss rates in the range envisioned by Congress, a

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<sup>1</sup> Joint Comments of the Edison Electric Institute and UTC, The Telecommunications Association ("EEI/UTC Comments") at 7; Comments of Ohio Edison Company ("Ohio Edison Comments") at 17; Comments of Union Electric Company ("Union Electric Comments") at 16-17; Comments of Duquesne Light Company ("Duquesne Comments") at 18; Comments of the Electric Utilities Coalition ("Electric Utilities Coalition Comments") at 18.

<sup>2</sup> Indeed, this is one reason for ICG's suggestion in its opening Comments that the Commission direct utilities to permit telecommunications carriers to attach to their poles, ducts, conduits and rights-of-way before reaching agreement on all issues.

carrier should not be required to engage in six months of futile discussions while its competitors proceed with construction.

The Commission should similarly reject the proposal by GTE and the USTA to require telecommunications carriers to provide thirty days' notice before filing a complaint.<sup>3</sup> Good faith requires telecommunications carriers to make a genuine effort to reach agreement with utilities who similarly negotiate in good faith, but they should not be required to wait even thirty days before filing a complaint when a utility refuses to negotiate or it is apparent that good faith efforts to reach agreement will not suffice.

SBC and the USTA propose to require a complainant to certify that it raised with the pole owner beforehand every issue contained in any subsequent complaint.<sup>4</sup> Although such a requirement may have superficial appeal, it would in effect impose an exhaustion requirement that is nowhere contemplated by the Pole Attachment Act. Frequently negotiations stall over major, conceptual issues before many of the issues the Commission might be called upon to resolve are ripe for discussion.<sup>5</sup> For example, a telecommunications carrier faced with an electric utility's total refusal to provide access to its ducts should not be required to anticipate and raise the issue of procedures for the

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<sup>3</sup> Comments of GTE Service Corporation ("GTE Comments") at 4; Comments of the United States Telephone Association ("USTA Comments") at 2.

<sup>4</sup> USTA Comments at 2; Comments of SBC Communications, Inc. ("SBC Comments") at 4 n.9.

<sup>5</sup> This phenomenon may also be observed in state arbitrations pursuant to 47 U.S.C. section 252, wherein state commissions not uncommonly receive second and third requests for arbitration of issues that become relevant only after other issues have been decided.

selection of contractors to do the work, although Commission resolution of such an issue might be appropriate as part of the ruling on an access or rate complaint. If a utility has no objections to a complainant's position on an issue first raised in a complaint it should not burden the utility to stipulate to resolution of that issue; if the utility does have an objection it is free to raise it in its answer.

In a similar vein, GTE proposes to require an attaching party, prior to filing a complaint, to provide the utility with its rate calculation and the basis for its disagreement regarding the formula results.<sup>6</sup> In ICG's experience, rate negotiations generally do not break down over disagreements concerning details of the application of the section 224 rate formula. If such a case arose, good faith generally would require a negotiating party to explain its position to the other party before filing a complaint. In the more common case, however, rate negotiations break down over a utility's refusal to apply section 224 at all, in which case the attaching party should not be required to engage in a futile effort to explain its interpretation of the formula. It should be sufficient for a complainant to show that it supplied information and responded to inquiries concerning issues that were actually raised by the other party to a negotiation. Before invoking any exhaustion requirement to dismiss or defer Commission action on a pole attachment complaint, a utility should be required to show that it requested information concerning the complainant's position on an issue and received no meaningful response.

GTE also proposes that the Commission apply a one year "statute of repose" to negotiated pole attachment rates and a \$5000 amount in controversy requirement for rate

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<sup>6</sup> GTE Comments at 4.

complaints.<sup>7</sup> SBC similarly suggests a presumption that a rate is not excessive if the attaching party has been paying the same or a higher rate for a lengthy period of time, such as a year.<sup>8</sup> Anecdotal evidence to the contrary notwithstanding, many parties to pole attachment agreements are reluctant to seek regulatory relief from rates to which they have in fact agreed, especially if there is otherwise a satisfactory working relationship between the utility and the attaching party. The virtue of an approach such as ICG's proposal to decouple the issues of access and rates by permitting telecommunications carriers to attach their facilities to utility poles for up to a year before reaching agreement on all issues is that it permits holding telecommunications carriers to negotiated rate agreements while depriving utilities of the excessive leverage provided by opportunities for delay. In contrast, GTE's and SBC's proposals would permit utilities to exert that leverage to extract agreement from carriers who are not inclined promptly to attack their own agreements as well as from those who are willing to do so, increasing opportunities for disparate treatment and the collection of excessive rates. GTE's and SBC's proposals would also penalize a telecommunications carrier that willingly agreed to a high rate for attachments to a small number of poles and later needed to attach to a much larger number of poles.

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<sup>7</sup> GTE Comments at 5. GTE refers to its proposal as a "statute of limitations," but it is more properly characterized as a statute of repose, which limits the time for bringing an action after a condition begins to exist, rather than a statute of limitations, which limits the time for bringing an action after an injury occurs. Each instance of charging an excessive rate constitutes a separate injury that restarts a statute of limitations, but not a statute of repose.

<sup>8</sup> SBC Comments at 4 n.9.

As aptly stated by GTE, "the best method for encouraging commercial transactions undeniably is to create a clear and readily available pole attachment rate formula that informs private negotiations and eliminates any perceived advantage a party may have in seeking Commission intervention in attachment disputes."<sup>9</sup> The Commission must reject arguments for "market rates" for pole attachments<sup>10</sup> or for the adoption only of general rules setting broad parameters for pole attachment rates,<sup>11</sup> as well as other attempts to reargue issues already decided by Congress. Although the regulations prescribed by the Commission are to govern charges for pole attachments only in the absence of agreement,<sup>12</sup> Congress was aware that rates can be nondiscriminatory only if negotiated rates are based upon the same methodology as rates determined by the Commission upon complaint. Accordingly, the cost allocation methodologies prescribed by sections 224(e)(2) and (3) are mandatory. Section 224(e)(2) states without qualification that "[a] *utility shall apportion*" the cost of unusable space in accordance with its terms, and section 224(e)(3) states that "[a] *utility shall apportion*" the cost of usable space as provided therein, not merely that the *Commission's regulations* shall employ those apportionment methodologies. While Congress left room for utilities and telecommunications carriers to negotiate the application of the apportionment

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<sup>9</sup> GTE Comments at 4-5.

<sup>10</sup> See, e.g., Ohio Edison Comments at 6-11; Union Electric Comments at 6-11; Duquesne Comments at 6-12; Comments of the New York State Investor Owned Electric Utilities ("NYEU Comments") at 3.

<sup>11</sup> See, e.g., Ohio Edison Comments at 11; Union Electric Comments at 11; Duquesne Comments at 12.

<sup>12</sup> 47 U.S.C. § 224(e)(1).

methodology Congress adopted, it did *not* authorize utilities to charge “market rates” for pole attachments. The best way for the Commission to facilitate such negotiations is for it to clearly state its interpretation of the statutory formula, not to interpose unauthorized procedural hurdles before those who seek its judgment.

**II. Although Congress Has Overruled *Heritage Cablevision* on its Specific Facts, the Principle Articulated in that Case Remains Applicable.**

Commenting parties have characterized the status of the Commission’s *Heritage Cablevision* decision in a variety of ways, some urging the Commission to reaffirm or extend it, others arguing that it has been overruled and must not be extended. ICG submits, however, that there is nearly unanimous agreement concerning the continuing vitality of the holding in *Heritage* despite the commenters’ differing characterizations. With the possible exception of certain CATV interests, all parties commenting on the issue agree that a CATV operator may not lease dark fiber to third parties after February 8, 2001, while paying the rate prescribed by section 224(d), but all commenters except Texas Utilities Electric Company (“Texas Utilities”) also agree that, with that one exception, a utility cannot restrict the leasing of dark fiber or charge an extra attachment fee to an attaching party that leases its dark fiber to a third party.

In *Heritage Cablevision* the Commission held that an electric utility could not charge a CATV operator a pole attachment fee greater than the fee prescribed pursuant to section 224(d) on the ground that the CATV operator leased dark fibers within its cable to an affiliate that used them to provide telecommunications services. Every commenter that directly addressed the issue agreed that the precise holding of *Heritage* has been overruled, and a CATV operator is no longer entitled to lease dark fiber to third parties

while paying the CATV-only pole attachment rate established under section 224(d).<sup>13</sup> Although not squarely stating their position on this issue, however, the National Cable Television Association (“NCTA”) and Comcast Corporation *et al.* (“Comcast”) urge that “[t]he present right of cable systems to transport signals originated by third parties over the system should be retained.”<sup>14</sup> To the extent that NCTA and Comcast seek to imply that a CATV operator leasing dark fiber or other transmission capacity to third parties may continue to pay the section 224(d) rate after February 8, 2001, they are incorrect. Section 224(d)(3) clearly states that after that date section 224(d) “shall apply to the rate for any pole attachment used by a cable television system *solely to provide cable service.*” Accordingly, once the regulations under section 224(e) become effective, CATV operators leasing dark fiber to third parties must pay the rate determined under that provision.

On the other hand, all commenters except Texas Utilities agree that an attaching entity paying rates determined under section 224(e) cannot be prohibited by the utility from leasing dark fibers within its cable to third parties or charged an additional fee for

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<sup>13</sup> See EEI/UTC Comments at 9–10; Comments of Sprint Local Telephone Companies on Specific Questions (“Sprint Comments”) at n.3; Initial Comments of Ameritech (“Ameritech Comments”) at 3–5; USTA Comments at 3–4; Comments of Bell Atlantic (“Bell Atlantic Comments”) at 3; SBC Comments at 8; MCI Comments at 2–6; Ohio Edison Comments at 19–23; Union Electric Comments at 19–22; Duquesne Comments at 21–23. *See also* Comments of US West, Inc. (“US West Comments”) at 4 n.11 (Section 224 “appears to limit the holding of *Heritage* in situations involving telecommunications services”).

<sup>14</sup> Comments of the National Cable Television Association (“NCTA Comments”) at 8; Comments of Comcast Corporation, *et al.* (“Comcast Comments”) at 12.

doing so.<sup>15</sup> Texas Utilities, continuing its solitary campaign to reap monopoly profits from users of its poles who lease dark fibers to third parties, contends that because the leasing of dark fiber is neither a cable service nor a telecommunications service, it is free to charge dark fiber lessors as much as it wishes for their pole attachments. Even assuming the validity of the premise that dark fiber leasing is not a telecommunications service, however, Texas Utilities' argument is fundamentally flawed. As long as attachments are used by a telecommunications carrier to provide telecommunications services, they clearly fall within the scope of section 224(e). The fact that they are *also* used for other purposes without imposing any additional burden on the pole or the pole owner does not mean that they are not "pole attachments used by telecommunications carriers to provide telecommunications services."<sup>16</sup> Even if Texas Utilities may prohibit or charge an unregulated rate for attachments used solely for purposes other than the provision of cable services and telecommunications services,<sup>17</sup> it does not follow that it may do so

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<sup>15</sup> See Comments of American Electric Power Service Corporation, *et al.* ("AEP Comments") at 43; Duquesne Comments at 29; NYEU Comments at 10-11; Union Electric Comments at 25-26; Ohio Edison Comments at 27-28; EEI/UTC Comments at 14; Comments of RCN Telecom Services, Inc. ("RCN Comments") at 6; Bell Atlantic Comments at 3; Comments of AT&T Corp. ("AT&T Comments") at 6; Ameritech Comments at 7; Sprint Comments at 2; Comments of KMC Telecom, Inc. ("KMC Comments") at 7-8; *See also* GTE Comments at 8 (no basis for allocating any cost to third party user of dark fiber). *But see* SBC Comments at 13 (arguing that it would be premature to address third party use of dark fiber before resolving the issues on remand from *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994)).

<sup>16</sup> 47 U.S.C. § 224(e)(1).

<sup>17</sup> ICG does not concede that dark fiber leasing does not under any circumstances constitute the provision of a telecommunications service.

simply because attachments used to provide cable services and telecommunications services are also used for other purposes.

ICG in its opening Comments discussed the fact that an attaching party that leases dark fibers to a third party does not by that transaction impose any cost or burden on the pole or pole owner and the importance of dark fiber leasing to the development of a competitive local exchange market, and all commenters but Texas Utilities agree that utilities should not be permitted to restrict dark fiber leasing. The Commission should reaffirm the basic principle stated in *Heritage*: utilities cannot prohibit dark fiber leasing or charge an additional fee to an attaching party that leases dark fiber, with the exception that a CATV operator leasing dark fiber must pay the section 224(e) rate, rather than the section 224(d) rate.

### **III. CATV Operators Must Pay Rates Under Section 224(e) for All Attachments Used to Provide Telecommunications Services.**

In their opening Comments, NCTA and Comcast contend that because of characteristics of the technology that CATV operators may use to provide telecommunications services they should not be required to pay rates determined under section 224(e) for all of the attachments they use to provide such services. They propose instead that operators of integrated CATV and telecommunications networks continue to pay rates under section 224(d) for most poles, paying section 224(e) rates only in proportion to the relative number of customers they have for cable services and telecommunications services.<sup>18</sup> Such an approach would not be competitively neutral.

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<sup>18</sup> NCTA Comments at 23–24; Comcast Comments at 15–17.

CATV operators providing telecommunications services, like other telecommunications carriers, should be required to pay rates under section 224(e) for all attachments that carry signals used to provide telecommunications services.

As explained by NCTA and Comcast, telecommunications services delivered over cable systems generally use a point-to-multipoint architecture over which telecommunications signals are transmitted throughout the entire network, but access is limited to discrete customers through the use of encryption.<sup>19</sup> They contend that it would be unfair to charge CATV operators the rates dictated by section 224(e) for all the attachments used to transmit telecommunications signals throughout their systems, while carriers using other technologies would pay only for the attachments used for point-to-point, circuit-switched transmissions.

Section 224(d)(3) expressly limits the application of section 224(d) after February 8, 2001, to “pole attachment[s] used by a cable television system *solely* to provide cable service.” Once a CATV system is contaminated with telecommunications traffic, it is no longer a pure CATV system; pole attachments used to support an integrated cable and telecommunications network are not used solely to provide cable service. The same system architecture that subjects CATV operators who provide telecommunications services to rates under section 224(e) for all of the poles in the system gives them a

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<sup>19</sup> In its Summary, Comcast refers to this as the “accidental transport of ... signals ... throughout an integrated cable system.” Comcast Comments at ii. The system-wide transport of signals may arguably be *incidental*, but it is scarcely *accidental*. It is the intended and unavoidable result of a conscious design decision and is one of the fundamental differences between packet-switched and circuit-switched networks.

ubiquity that is only available to other carriers if they build comparable networks, paying section 224(e) rates for all of their pole attachments.

NCTA and Comcast assert that charging CATV operators rates under section 224(e) for all of the attachments used to support their broadband networks would “create[] a barrier (in the form of a dramatic, system-wide pole cost increase) which strongly disfavors the introduction of new services on an integrated basis.”<sup>20</sup> Congress addressed the issue of “rate shock” in the transition from section 224(d) to section 224(e) by directing that any rate increase be phased in over five years.<sup>21</sup> To further shelter CATV operators would favor one technology over another and bias investment decisions on the basis of regulatory policy rather than technological merit. The “barrier” of the incremental rate increase from section 224(d) to section 224(e) pales beside the cost to any other telecommunications carrier of constructing a network capable of offering telecommunications services to every business and residence passed by a CATV operator. CATV operators should not be heard to complain about the cost of the very ubiquity that gives them a head start over other new facilities-based entrants into local telecommunications markets.

A CATV operator that has upgraded only a portion of its system to be capable of offering telecommunications services should retain the benefit of section 224(d) rates for the portion of its system that has not been upgraded. ICG understands this to be the

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<sup>20</sup> NCTA Comments at 23; Comcast Comments at 16 (“massive barrier”).

<sup>21</sup> 47 U.S.C. § 224(e)(4).

position taken by Adelphia Communications and other CATV operators.<sup>22</sup> Section 224(e) rates should apply to all attachments used by an integrated cable and telecommunications network, however, just as they do to all attachments used by any other telecommunications network. For the Commission to rule otherwise would favor one technology over another and would not be nondiscriminatory or competitively neutral.

**IV. Two-Thirds of the Cost of Unusable Space Must Be Apportioned Among All Revenue-Producing Users of the Pole or Duct.**

The opening comments on the issue of which users of a pole or duct should be considered to be “attaching entities” for purposes of apportioning two-thirds of the cost of the unusable space exhibit some confusion and demonstrate the extent of the effort by some electric utilities to over-recover pole costs from attaching parties. ICG submits that the correct principle is that all users of a pole or conduit are “attaching entities” referred to in section 224(e)(2), except for governmental entities, the cost of whose use should be shared by all users (including the owner), rather than borne solely by the owner. Pole and conduit owners are separately compensated for the use of their poles and conduits by users who are not covered by section 224(e), so there is no unfairness in including those users in the apportionment of unusable space costs under section 224(e)(2).

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<sup>22</sup> Comments of Adelphia Communications Corp., *et al.* (“Adelphia Comments”) at 9–10.

**A. Incumbent LECs Must Be Counted as “Attaching Entities” to Avoid Overrecovery by Electric Utilities.**

Seizing upon the fact that incumbent LECs are not “telecommunications carriers” for purposes of section 224, several electric utilities contended that incumbent LECs similarly are not “attaching entities.”<sup>23</sup> SBC was the only commenter from the communications industry to support this view fully.<sup>24</sup> Bell Atlantic and Ameritech acknowledged that the real issue is comparable treatment of electric utilities and incumbent LECs.<sup>25</sup> Most communications industry commenters, including some incumbent LECs,<sup>26</sup> as well as some electric utilities,<sup>27</sup> agreed that incumbent LECs are “attaching entities.”<sup>28</sup> Only GTE correctly noted that electric utilities should also be counted as attaching entities.<sup>29</sup>

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<sup>23</sup> EEI/UTC Comments at 20–21; Ohio Edison Comments at 38–39; Union Electric Comments at 36; NYEU Comments at 22; Duquesne Comments at 40–41.

<sup>24</sup> SBC Comments at 21.

<sup>25</sup> Bell Atlantic Comments at 6; Ameritech Comments at 11–12.

<sup>26</sup> US West Comments at 7; Sprint Comments at 2 (unnumbered); NCTA Comments at 18; Comcast Comments 6; AT&T Comments at 12–13; KMC Comments at 6.

<sup>27</sup> Electric Utilities Coalition Comments at 5; AEP Comments at 41.

<sup>28</sup> As noted by US West, there is no significance to the fact that Congress excluded incumbent LECs from the definition of “telecommunications carriers” for purposes of section 224. Section 224(e)(2) requires an apportionment among all “attaching entities,” not all “telecommunications carriers,” and section 224(a)(4) defines a “pole attachment” as “any attachment by a cable television system or *provider of telecommunications service*,” not as an attachment by a CATV operator or “telecommunications carrier.” US West Comments at 7.

<sup>29</sup> GTE Comments at 11.

Congress directed that two-thirds of the cost of unusable space be apportioned among all “attaching entities.” Electric utilities already collect a significant share of unusable space costs from incumbent LECs. As noted by the New York State Investor Owned Electric Utilities, electric utilities and incumbent LECs are often parties to agreements that share costs on the basis of an ownership ratio and result in incumbent LECs bearing as much as half the cost of jointly-used poles.<sup>30</sup> Many other agreements between electric utilities and incumbent LECs set similar rates based upon an allocation of three feet of usable space to the incumbent LEC and seven and one-half feet to the electric utility.<sup>31</sup> Failure to count incumbent LECs as “attaching entities” on electric utility poles would permit electric utilities to over-recover unusable space costs from telecommunications carriers.

**B. Electric Utilities Must Be Counted as “Attaching Entities” to Avoid Overrecovery by LECs.**

Similarly, the same agreements under which electric utilities recover up to half of their pole costs from incumbent LECs result in incumbent LECs recovering as much as sixty percent of the cost of their poles from electric utilities. Failure to count the electric utility when setting rates for use of incumbent LECs’ poles would result in telecommunications carriers paying higher pole attachment rates to their competitors

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<sup>30</sup> NYEU Comments at 21 n.7.

<sup>31</sup> Cf. *Just and Reasonable Rates and Charges for Pole Attachments: The Utility Perspective*, filed with the Commission on August 28, 1996 by McDermott, Will and Emery on behalf of American Electric Power Service Corp., Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power & Light Company, Northern States Power Company, The Southern Company, and Washington Water Power Company, at 11.

than to nondiscriminatorily avaricious electric utilities. The fact that electric utility facilities are not “pole attachments” as defined in section 224(a)(4) is insignificant, as Congress carefully used the broad term “attaching entities,” rather than a term given a more narrow meaning by another provision of the statute, when directing the equal apportionment of two-thirds of unusable space costs. Electric utilities must be counted as “attaching entities” in order to avoid excessive rates for the use of incumbent LECs’ poles.

**C. Pure CATV Operators Must Be Counted as “Attaching Entities” to Avoid Overrecovery by All Pole Owners.**

Exposing their willingness to overreach in order to maximize their overrecovery of pole costs from attaching parties, three electric utilities contend that CATV operators should also be excluded from the count of “attaching entities” unless they provide telecommunications services.<sup>32</sup> Even the other electric utilities that commented upon this issue agreed that CATV operators are “attaching entities.”<sup>33</sup> If neither incumbent LECs, CATV operators, nor electric utilities are “attaching entities” as contended by these three electric utilities, the first telecommunications carrier to attach to a pole would be forced to bear *the full two-thirds* of the cost of the unusable space. Indeed, as discussed elsewhere in these Comments, when combined with the same utilities’ proposal to average urban and rural areas when counting attaching entities, the exclusion of

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<sup>32</sup> Ohio Edison Comments 38; Union Electric Comments at 35; Duquesne Comments at 38–40. *See also* Ameritech Comments at 11.

<sup>33</sup> *See* Electric Utilities Coalition Comments at 5; NYEU Comments at 22; AEP Comments at 39–40.

incumbent LECs, CATV operators and electric utilities from the count would likely result in *each telecommunications carrier bearing more than two-thirds of the cost of unusable space on electric utility poles*. The Commission must reject such a proposal out of hand.

**V. The Commission Must Determine a Presumptive Average Number of Attaching Entities Per Pole.**

In its opening Comments, ICG proposed a relatively simple methodology for a Commission-administered survey to determine the average number of attaching entities on each pole bearing CATV and telecommunications attachments. Whether or not the Commission conducts such a survey, however, the Comments of other parties make clear that it is critical to the implementation of section 224(e) for the Commission to determine a presumptive number of attaching entities per pole rather than leave that determination to individual utilities. Only by adopting a national presumption can the Commission limit the ability of utilities to overcharge telecommunications carriers for pole attachments by understating the number of attaching entities among whom the cost of unusable space is apportioned.

Unsurprisingly, the only support for giving utilities free rein to determine the number of attaching entities on their poles came from pole owners.<sup>34</sup> As noted by Comcast, utilities have an incentive to understate the number of attaching entities in order to

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<sup>34</sup> See Electric Utilities Coalition Comments at 7; Bell Atlantic Comments at 7; Ameritech Comments at 13; Sprint Comments at 3 (unnumbered); EEI/UTC Comments at 24; Ohio Edison Comments at 42; Union Electric Comments at 39; Duquesne Comments at 43-44; NYEU Comments at 24; AEP Comments at 44. *But see also* MCI Comments at 16 and n.34 (proposing to use average developed from utility's records, but with attaching party having the right to base rates on a survey of the actual poles to which it seeks to attach).

collect higher pole attachment fees.<sup>35</sup> Indeed, three electric utilities propose, in essentially identical language, to develop system-wide averages without distinguishing between rural areas that are unlikely for some time to have attachments by anyone other than the electric utility, the incumbent LEC and perhaps a CATV operator and urban areas that may already have attachments by two or more telecommunications carriers.<sup>36</sup> Such an approach, together with the same utilities' proposals for excluding incumbent LECs, CATV operators and electric utilities from the count of attaching entities, would be likely to result in an average number of attaching entities that is less than one. If the number of attaching entities in the proposed formula is less than one, *more than two-thirds* of the cost of the unusable space would be allocated to *each* telecommunications carrier. Even US West and GTE, two large owners of poles with competitive incentives as incumbent LECs to disadvantage new entrants, recognize the need for the Commission to adopt national presumptions concerning the number of attaching entities.<sup>37</sup>

Support for a Commission-administered survey was admittedly less than overwhelming,<sup>38</sup> but several commenters suggested alternative approaches to developing a national presumption. The most thoroughly-developed alternative was proposed by

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<sup>35</sup> Comcast Comments at 10.

<sup>36</sup> See Ohio Edison Comments at 41-42; Union Electric Comments at 39; Duquesne Comments at 43-44.

<sup>37</sup> GTE Comments at 12; US West Comments at 9 n.25.

<sup>38</sup> Many of the objections to such a survey appear to be grounded in its presumed complexity, however, and would not apply to the approach suggested in ICG's Comments.

Comcast<sup>39</sup> and supported by NCTA.<sup>40</sup> Using data derived from the Commission's *Fiber Deployment Update*, Comcast proposes a presumption that poles in urban areas have an average of six attaching entities and rural poles an average of three. Comcast's approach seems reasonable and is grounded upon publicly available data.

The presumptions proposed by AT&T and GTE, two commenters having long experience with the shared use of poles, also seem reasonable although perhaps somewhat conservative. GTE "strongly supports" a presumption of three attaching entities per pole,<sup>41</sup> while AT&T suggests a presumption that any pole bearing attachments governed by section 224(e) has at least three attaching entities.<sup>42</sup> AT&T correctly notes the importance of counting attaching entities only on poles that bear pole attachments in order to avoid imposing on telecommunications carriers the cost of unusable space on poles that are not used for pole attachments.<sup>43</sup>

ICG submits that the Commission should either conduct its own survey, using a simple approach such as the one suggested in ICG's opening Comments, or should adopt specific parameters for utility-specific surveys. The number of attaching entities is likely to vary significantly not only between rural and urban areas, but also between widely separated urban areas in otherwise rural states. If utilities are given latitude to select the

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<sup>39</sup> Comcast Comments at 10.

<sup>40</sup> NCTA Comments at 20.

<sup>41</sup> GTE Comments at 12.

<sup>42</sup> AT&T Comments at 13-14.

<sup>43</sup> *Id.* at 13 n.14.

survey methodology, many will be tempted to combine areas with relatively few and relatively many attaching entities in order to depress the average and correspondingly increase the presumptive section 224(e) pole attachment rate. The approach suggested by ICG, which would derive urban, rural and regional averages from surveys already conducted jointly by utilities and attaching entities, would limit opportunities for such manipulation without imposing significant new record-keeping burdens.

NCTA and Comcast correctly note that any survey, in order to be useful, should be performed as closely as possible to the effective date of the rate methodology set forth in section 224(e) because of the likely growth in the number of attaching entities between now and then.<sup>44</sup> For the same reason, any survey, whether or not administered by the Commission, must be updated frequently, at least until sufficient competition has developed that the number of attaching entities is relatively stable. A continuously updated national survey such as the one proposed by ICG could easily be based upon only the most current data, perhaps using surveys from a rolling one-year period, while covering enough poles to be meaningful. By contrast, individual utilities perform field surveys an average of only once every five years, resulting in a downward bias in the count of attaching entities in the critical early years of rapid growth.

Despite the modest support for a national survey to determine the average number of attaching entities per pole, ICG submits that such an approach is necessary in order to produce an unbiased presumption that adequately accounts for urban, rural and regional differences and the rate of growth in the number of attaching entities. In the alternative,

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<sup>44</sup> NCTA Comments at 21-22; Comcast Comments at 8 n.13.